





1 APPEARANCES:

2 FOR THE PLAINTIFF: (See Attorney Attendance Sheet docketed  
in minutes of this hearing.)

3

4 FOR THE DEFENDANTS: (See Attorney Attendance Sheet docketed  
in minutes of this hearing.)

5

6 COURT REPORTER: Shelly Holmes, CSR, TCRR  
Official Reporter  
7 United States District Court  
Eastern District of Texas  
8 Marshall Division  
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9 Marshall, Texas 75670  
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11 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 This is a continuation of the pre-trial hearing in  
4 the Fractus versus AT&T Mobility matter, what we've  
5 commonly referred to on the record as the CommScope trial.

6 We adjourned yesterday evening after having -- we  
7 recessed, rather, yesterday evening, having covered  
8 pre-trial matters but for the issue of disputed exhibits.

9 The Court directed the parties to continue to meet  
10 and confer overnight in an attempt to narrow and streamline  
11 any surviving exhibit disputes.

12 It appears we have all the same faces in the  
13 courtroom we had yesterday. I won't formally call for  
14 announcements on the record because it appears everybody is  
15 well represented.

16 But I will ask at this juncture for an update from  
17 the parties as to where we stand on remaining disputes  
18 related to the pre-admission of exhibits for the trial.

19 MS. RUIZ: May I, Your Honor?

20 THE COURT: Please.

21 MS. RUIZ: Good morning, Your Honor. Gabriela  
22 Ruiz with Kobre & Kim for Fractus.

23 Your Honor, after meeting and conferring last time  
24 on Plaintiff's objections, we've resolved all of the  
25 buckets, except for three of them that remain in dispute.

1           THE COURT: These are Plaintiff's objections to  
2 Defendants' proposed exhibits?

3           MS. RUIZ: Correct, Your Honor.

4           And on Defendants' objections to Plaintiff's  
5 proposed exhibits, we've resolved all but five buckets  
6 which remain in dispute.

7           THE COURT: All right. Why don't you identify the  
8 eight remaining buckets of objection -- of objected to  
9 exhibits in each of these two categories for me?

10          MS. RUIZ: Yes, Your Honor.

11          On the Defendants' objections to Plaintiff's  
12 exhibits, Bucket 18, there are three exhibits in that  
13 bucket that remain in dispute. It's the one called  
14 declarations.

15          Bucket 23A, which is Dr. Long's testing and  
16 simulation data, 18 exhibits in that bucket remain in  
17 dispute.

18          23B, Dr. Long's summary exhibits, 12 exhibits in  
19 that bucket remain in dispute.

20          Bucket 27, expert summaries, two exhibits in that  
21 bucket remain in dispute.

22          THE COURT: You have one more?

23          MS. RUIZ: Oh, one more, yes, Your Honor.

24          Bucket 41, the carrier purchase contracts, two --  
25 two exhibits in that bucket -- I'm sorry, three exhibits in

1 that bucket remain in dispute.

2 Oh, we withdrew one.

3 MR. BREMER: Yes.

4 MS. RUIZ: Two exhibits, Your Honor.

5 THE COURT: Okay.

6 MS. RUIZ: Plaintiff's objections to Defendants'  
7 exhibits, Bucket 3, non-party technical documents, one  
8 exhibit remains in dispute.

9 On Bucket 10, which is expert materials, it's  
10 mostly resolved, Your Honor, but there's a carve-out for  
11 certain exhibits that are testing results which will -- the  
12 parties agree would rise or fall with the decision on  
13 Bucket 23A. We would agree that the Court's decision on  
14 Dr. Long's testing results would govern this bucket.

15 And on Bucket 18, on Fractus patents, two  
16 exhibits remain in dispute. It's actually one exhibit,  
17 but there are two -- two versions of that exhibit, Your  
18 Honor.

19 THE COURT: All right. Let me ask -- Mr. Bremer,  
20 you seem to be up and down in your chair. What can you add  
21 or subtract?

22 MR. BREMER: Sorry, Your Honor. I was just going  
23 to consult with her for a minute.

24 (Off the record discussion.)

25 MS. RUIZ: Yes.

1 MR. BREMER: I agree.

2 THE COURT: Well, as long as you're up, can you  
3 confirm that that's an accurate representation from the  
4 Defendants' side of the room?

5 MR. BREMER: Yes, Your Honor, it is accurate.

6 THE COURT: Okay. Well, it appears, given that  
7 you've told me that Bucket 23A regarding objections from  
8 Defendant to Plaintiff's exhibits would govern and control  
9 Bucket 10 of Plaintiff's objections to Defendants'  
10 exhibits, then we should apparently start with the  
11 Plaintiff's exhibits and the Defendants' objections  
12 thereto.

13 Anyone see a reason not to do it that way? Then  
14 we'll start -- we'll start on that side of the ledger, so  
15 to speak, and let's begin with Bucket 18 regarding, again,  
16 Defendants' objections to Plaintiff's exhibits.

17 Let me hear from Defendant as to what your  
18 objections are.

19 And, again, it's the Court's assumption that  
20 whether there are one or multiple documents in these  
21 buckets, that they all rise or fall in an area of discrete  
22 guidance that I can give you across the board, and that's  
23 what I want to hear about.

24 MR. COX: I believe that's accurate, Your Honor.

25 Brady Cox for Defendants here talking about this

1 category that we've labeled declarations.

2           These are declarations made by various  
3 representatives of Verizon or AT&T to the FCC in pursuit  
4 of purchasing additional spectrum, which is -- and I know  
5 you raised, you know, spectrum spend is a thing that, you  
6 know, was a little ambiguous yesterday, and I can do my  
7 best to explain kind of what it is, is the various  
8 carriers, you know, can use these different frequency  
9 ranges across the country, but they need to purchase  
10 licenses in various discrete geographic regions -- you  
11 know, like Harrison County, Verizon has to purchase a  
12 license to use 1900 to 1920 megahertz and 1960 to 1980  
13 megahertz and so on.

14           And in pursuit of Verizon's application to  
15 purchase additional spectrum, they submitted this  
16 declaration -- if I could use the ELMO, Ms. Lockhart, thank  
17 you -- of -- of William Stone. And we think that this is  
18 within your ruling on spectrum spend on the MIL issue  
19 yesterday where the --

20           THE COURT: Let me stop -- let me stop you for a  
21 minute.

22           MR. COX: Sure.

23           THE COURT: Is -- is this declaration proposed by  
24 Plaintiffs to be admitted as an exhibit during the trial?

25           MR. COX: That's right.

1           THE COURT: Is Mr. Stone going to testify in this  
2 case? If so, why do we have a declaration? And if  
3 Mr. Stone is not going to testify in this case, how do I  
4 possibly admit an out-of-court statement in writing from  
5 somebody that's not going to be here to be cross-examined?

6           I mean, the first question in my mind is how could  
7 this possibly be an appropriate exhibit for admission under  
8 the rules of evidence?

9           MR. COX: I can say what I think they're going to  
10 say. You know, he is a Verizon witness, and so they would  
11 say that's --

12          THE COURT: Well --

13          MR. COX: -- but I'll let them --

14          THE COURT: -- why don't we let them say what  
15 they're going to say.

16          MR. SAUTER: Thank you, Your Honor.

17          So in terms of hearsay, we would say it's an  
18 admission by a party opponent who's not here to testify.

19          THE COURT: So I gather this gentleman, wherever  
20 he is, is not going to be here during the trial?

21          MR. SAUTER: He -- he is a -- he's a Verizon  
22 employee. He will not be here to testify. For that  
23 particular exclusion -- exception from hearsay, it's  
24 actually not even required. It is a -- an admission by a  
25 party opponent, but he won't be here, to my knowledge.

1 THE COURT: Has he been deposed? Will there be  
2 deposition testimony offered from him?

3 MR. SAUTER: We do not have deposition testimony  
4 of him, Your Honor.

5 THE COURT: Okay. Then let's return to whatever  
6 the Defendants' basis to object is.

7 MR. COX: And -- and I will say that Verizon --  
8 Fractus initially noticed the deposition of Mr. Stone, and  
9 we tabled that as an apex witness deposition, and there was  
10 never follow-up on that.

11 THE COURT: Well, we are where we are, counsel.  
12 We can't go backwards. Let's talk about what we have and  
13 whether it is or isn't admissible under the rules.

14 MR. COX: Right. And so regardless of the hearsay  
15 and whether he could come in, we think that this is also  
16 irrelevant. The only mention of this in the expert report  
17 of -- of Mr. Mills is, you know, he says: As a result,  
18 network operators throughout the world have seen  
19 significant increases in mobile data utilization --

20 THE COURT: Slow -- slow down. I know you can  
21 read fast, but slow down.

22 MR. COX: I will. Thank you, Your Honor.

23 As a result, network operators throughout the  
24 world have seen significant increases in mobile data  
25 utilization in recent years. That's the only proposition

1 for which this is cited in the expert report. And it goes  
2 on about, you know, the -- the explosive --

3 THE COURT: Pull the -- pull the page up on the  
4 ELMO. Let me see what that footnote relates to. Okay. Go  
5 ahead. It's -- it clearly --

6 MR. COX: It does cite to it.

7 THE COURT: It does cite to it in the footnote.  
8 Okay.

9 MR. COX: And -- but the proposition for which  
10 it's cited, you know, they -- we would stipulate to that.  
11 There have been significant increases in mobile data  
12 utilization, but the purchase of additional spectrum spend  
13 is not a thing that's relevant to the patents at issue in  
14 this case. There's been no argument by any expert that  
15 these patents somehow increase capacity or allow Verizon to  
16 work on frequencies that they couldn't work on before.

17 You know, Verizon could always have worked on  
18 these different spectra, whether they were using single  
19 band or multiband antennas. And so I just don't think it's  
20 relevant to anything at issue in this case, Your Honor.

21 THE COURT: So your objection -- I assume you  
22 don't concede to the admission against interest exception  
23 to the hearsay rule, but that notwithstanding, your primary  
24 argument is relevance?

25 MR. COX: That's correct, Your Honor.

1           THE COURT: Is there something in the declaration  
2 that you view other than -- other than the substance of  
3 what's said and/or admitted to, is there something else  
4 that's prejudicial or inflammatory in any way that you're  
5 concerned about in the declaration?

6           MR. COX: There is, Your Honor.

7           So, for example, they talk about the number of  
8 subscribers that are on the Verizon network and how that  
9 number is increasing and how they are -- the number of  
10 bandwidth they are sucking down the network is increasing  
11 over time. And I think those are all kind of large  
12 numbers, and Plaintiff wants to paint a picture of, you  
13 know, their invention allows, you know, you to download  
14 video and -- and -- and that's just not what these patents  
15 are about, and we don't want that implication made.

16          THE COURT: Well, it's always a point of interest  
17 to the Court as to whether something like this is offered  
18 for a purpose, that purpose is objected to, and then in  
19 trial, it gets used for some completely different purpose,  
20 and that's what I'm asking about.

21          Let me ask Plaintiffs: Is there a need for the  
22 admission of the entirety of this document, or is there  
23 just a section of it that addresses the point you're  
24 concerned about?

25          And I'm not assuming you have some hidden purpose

1 you're going to pull it out and use it for as a surprise or  
2 ambush. I just have to -- this is the time for me to ask  
3 those questions.

4 MR. SAUTER: Absolutely. If I may approach?

5 THE COURT: Yes, you may.

6 MR. SAUTER: I can show you -- I actually think  
7 this document is highly relevant for exactly the reasons  
8 that -- that counsel said, which is it describes why the  
9 carriers want to go out and acquire more spectrum. They  
10 need it. And it goes directly to the value of Fractus's  
11 invention to the carriers. Recall, it allows the carriers  
12 to use multiple frequency bands on antenna arrays.

13 So the more demand that the carriers have, the  
14 more capacity it needs, the more it needs Fractus's  
15 invention. That is at the heart of our damages theory  
16 as -- as a whole. But putting that aside, there are  
17 actually -- I can just point Your Honor specifically to two  
18 paragraphs in this declaration that I think are highly  
19 important.

20 And -- and before I do, you may recall from our  
21 discussion during the Daubert briefing, the concept of  
22 future proofing. So one of the things that the carriers  
23 value about Fractus's invention is it allows them to put up  
24 antennas that it can use on multiple frequency bands in the  
25 future even if they're not today.

1           And so let me -- Paragraphs 12 and 13 of this  
2       declaration go exactly to this point. Mr. Stone  
3       acknowledges that it takes a long time even once they  
4       get --

5           THE COURT: Let -- let me just read it quickly,  
6       those paragraphs.

7           MR. COX: Your Honor, may I approach?

8           THE COURT: I can see it on the screen.

9           MR. COX: Okay.

10          THE COURT: Okay. Anything further from  
11       Defendants with regard to this exhibit?

12          MR. COX: One slight clarification to one exhibit  
13       in this bucket. 2838 is a declaration by an AT&T employee,  
14       so that -- hearsay because AT&T is not a party to this  
15       case, would extra apply then --

16          THE COURT: Okay.

17          MR. COX: -- for that exhibit specifically.

18          THE COURT: Well, as to this declaration and any  
19       similar declaration from a party to this case and given  
20       what's been argued, I think the -- I think the threshold of  
21       appropriate relevance has been met, so I'm going to  
22       overrule your relevance objection. And given that this is  
23       from an officer of a party to the case, I'm going to  
24       overrule your hearsay objection.

25          So this is pre-admitted, and everything else of a

1 similar nature in this category is pre-admitted. If you  
2 want to show me the particular AT&T document which  
3 identifies the declarant, we can talk about that.

4 MR. COX: Here we have Exhibit 2838, Your Honor,  
5 and it's by --

6 THE COURT: I see it.

7 MR. COX: -- William -- William Hogg of AT&T  
8 Services, Inc., which is not a party to this case.

9 THE COURT: What's Plaintiff's response to the  
10 hearsay objection regarding this declaration?

11 MR. SAUTER: Your Honor, we would ask the Court to  
12 allow this document to be admitted under the residual  
13 hearsay objection because there are circumstantial  
14 guarantees of trustworthiness. It was submitted by AT&T in  
15 connection with its attempt to acquire T-Mobile, so it's a  
16 declaration that speaks about the need for that  
17 transaction. Similar subject matter is the Stone  
18 declaration that we just looked at.

19 So it goes to a material fact. And the probative  
20 value of it, I submit, because it is a sworn statement by  
21 AT&T talking about the need for spectrum, it outweighs any  
22 prejudicial value which counsel still has not identified at  
23 all.

24 THE COURT: Substantively, is this repetitive of  
25 what's in the other declarations? It's just from AT&T?

1 MR. SAUTER: It's the AT&T version, Your Honor.

2 THE COURT: Okay. And is there a specific  
3 subsection of Rule 803 you want to cite to me?

4 MR. SAUTER: If I may return to my desk, I can  
5 tell you. One moment.

6 MR. COX: And while he's looking for that, Your  
7 Honor, can I just add one point?

8 THE COURT: Go ahead.

9 MR. COX: I think an issue -- whether this comes  
10 in or not is -- what witness it comes in through, since  
11 there'll be no AT&T witness at trial to testify or rebut  
12 anything in this declaration, I'm not sure what witness it  
13 comes in through, except to the extent that it is cited in  
14 an expert report.

15 MR. SAUTER: The rule, Your Honor, is 807(a) is  
16 the residual hearsay exception, and I -- I believe this is  
17 cited in Mr. Mills's report. I can find a -- a citation to  
18 confirm that.

19 MR. COX: I'm sure it is in the --

20 THE COURT: Yeah, I'm sure it is, too.

21 Well, I'm going to sustain the objection as to the  
22 AT&T declaration. I don't find that it's more probative  
23 for the point for which it's offered than other evidence,  
24 as required by Rule 807. And, quite honestly, it's one  
25 more opportunity to confuse the jury with somebody who's

1 not in the courtroom.

2 And given that it's the AT&T version of what's  
3 already in this bucket from the other named and present  
4 Defendants, I'm going to sustain the objection to that.  
5 But the remainder of the documents, I'll overrule  
6 Plaintiff's objection, and they're pre-admitted, all right?

7 MR. SAUTER: Thank you, Your Honor.

8 THE COURT: All right. What's the next bucket?  
9 Is this 23A regarding Dr. Long?

10 MR. FINDLAY: Yes, Your Honor.

11 THE COURT: Let's proceed to take that up.

12 MR. FINDLAY: Eric Findlay on behalf of the  
13 Defendants, Your Honor.

14 There are a number of testing documents that both  
15 Dr. Lang -- Dr. Long, excuse me, for Fractus and Dr. Kakaes  
16 for CommScope had run, directed somebody to run, and  
17 attached them to their expert reports.

18 We don't have a problem with them being used as  
19 demonstratives. That would be our proposal.

20 Plaintiff's proposal is that they be admitted into  
21 evidence as exhibits. We think that's inappropriate for a  
22 couple of reasons.

23 First, this Court's default rule, as I think  
24 you've indicated during the pre-trial conference the past  
25 couple of days, is, as I think is the norm, that expert

1 reports typically don't come into evidence. This is just  
2 part of the expert report.

3 Specifically on one of the examples, PX-3723,  
4 which is a printout of a portion of one of the tests that  
5 Dr. Long ran, it's my understanding Dr. Long didn't perform  
6 this testing. He directed somebody else to do it.

7 And, again, that's completely acceptable for an  
8 expert to do, and then he or she may rely upon that. But  
9 we don't think it's appropriate to come in as evidence,  
10 Your Honor. And we would submit that these should be used  
11 as no more as demonstratives on both sides.

12 THE COURT: And the -- the specific evidentiary  
13 rule that you're raising as regards the objection is what?

14 MR. FINDLAY: Well, I don't think it's proper  
15 evidence. It's -- it's --

16 THE COURT: I don't know where that rule is in the  
17 rules of evidence, I don't think it's proper evidence.

18 MR. FINDLAY: It's argument. It's opinion  
19 evidence, so I think it's 401, 403, and I don't think it  
20 applies. And hearsay.

21 Thank you.

22 THE COURT: Let me hear from Plaintiff.

23 MR. STAMATOPOLOUS: Good morning, Your Honor.  
24 George Stamatopolous with Kobre & Kim for Fractus.

25 So as regards the hearsay objections, there's

1 ample case law that suggests that broad data and test  
2 results are not hearsay. They're not statements offered by  
3 a person.

4           Moreover, it's verifiable material. I think it's  
5 pretty standard that broad data is appropriate evidence.

6           As regards the relevance of Dr. Long's test  
7 results, which were, in fact -- were, indeed, performed at  
8 his direction, this material is -- if not integral, it's  
9 very important to proving Fractus's infringement case. And  
10 it would be very helpful for the jury -- Mr. Findlay showed  
11 you an excerpt of the raw data. He showed you in tabular  
12 format a number of rows and columns, the data that was  
13 generated by a machine when Dr. Long's testing was  
14 performed.

15           There's actually graphs that show exactly how the  
16 various claim limitations are met, specifically with  
17 respect to impedance and radiation patterns.

18           Besides that, yeah, I think the -- I think the  
19 hearsay objection is pretty clear that it doesn't -- it  
20 really doesn't hold water.

21           THE COURT: All right. Thank you, counsel.

22           MR. STAMATOPOLOUS: Thank you.

23           MR. FINDLAY: Your Honor, may I?

24           THE COURT: Very briefly.

25           MR. FINDLAY: Just on -- okay, just so the record

1 is clear because I might have confused the issue, and if I  
2 did, I apologize.

3 On the hearsay objection, Dr. Long didn't produce  
4 these. He didn't run the tests, as I understand. He  
5 directed somebody else to do it. So I don't think that  
6 automatically -- I don't think it's taken out of the  
7 hearsay objection. I think it's still appropriate.

8 THE COURT: I -- I gather not only did Dr. Long  
9 perform the test, Dr. Long did not directly supervise the  
10 test being performed?

11 MR. FINDLAY: Correct.

12 THE COURT: Some third party outside of Dr. Long's  
13 direct supervision and purview performed the test and then  
14 sent him this results; is that accurate?

15 MR. FINDLAY: That's my understanding, yes, sir.

16 THE COURT: Is that accurate from Plaintiff's  
17 standpoint?

18 You know, sometimes it's not Dr. Long but it's  
19 Dr. Long's assistant who's worked with him closely for  
20 years and is in the same laboratory or building, and  
21 sometimes it's a third-party testing laboratory halfway  
22 across the country. So some more context here would be  
23 helpful.

24 MR. STAMATOPOLOUS: Certainly, Your Honor.

25 So it was -- it was a third party. It was a third

1 party to which Dr. Long sent -- or rather, sent and  
2 discussed a very elaborate testing protocol. Also,  
3 Dr. Long visited the facility. He met with the people  
4 performing the tests.

5           So we submit, Your Honor, that the -- the tests  
6 were performed at his direction. They're reliable. And to  
7 the extent Defendants question the reliability of the  
8 tests, that should have been raised, I think, in a Daubert  
9 motion, as opposed to an objection with respect to the  
10 specific materials that we propose be admitted into  
11 evidence.

12           THE COURT: All right.

13           MR. STAMATOPOLOUS: Thank you.

14           THE COURT: I'm going to sustain the objection to  
15 Bucket 23A. At a high level, Dr. Long's going to testify.  
16 His report has been provided. These are matters he'll  
17 testify directly from the stand on.

18           And to the extent this supporting documentation is  
19 helpful to the presentation of his oral testimony, he's  
20 certainly entitled to use these exhibits attached -- or  
21 these attachments to his report as demonstratives.

22           But I don't think they should be admitted as  
23 actual exhibits in the case. And I'll sustain Defendants'  
24 objection to Bucket 23A.

25           MR. WARD: And, Your Honor, just so we're clear,

1 you're sustaining the hearsay or relevance or --

2 THE COURT: Primarily the hearsay. There's human  
3 input involved. This was done by somebody that is not here  
4 to testify about what they did or how they did it.  
5 Dr. Long may have said I want you to do X. Dr. Long wasn't  
6 there to see that they did X. They sent back their  
7 results. Dr. Long doesn't have personal knowledge of how  
8 the test was done.

9 I think there is a -- I think there is a valid  
10 hearsay objection here. And at a high level, I also think  
11 that you need a strong reason to start pulling pieces out  
12 of hundred-plus page exhibit -- reports and making them  
13 exhibits in trial when you're going to have the witness  
14 there who is the knowledgeable person and who's going to  
15 testify about their conclusions and the basis for it.

16 All right. That objection is sustained.

17 Let's go on to 23B. And I assume that will also  
18 cover Bucket 10 on the other side of the ledger, but we'll  
19 get to that shortly.

20 MR. FINDLAY: Okay. Thank you, Your Honor.

21 THE COURT: 23B is next.

22 MR. FINDLAY: Yes -- yes, sir.

23 These are summaries that Fractus intends to admit  
24 as evidence, which we do not think is appropriate.

25 And I'll start with the rule, FRE 1006, summaries

1 to provide content. It does say that a proponent may use a  
2 summary chart or calculation to prove the content of  
3 voluminous writings, recordings, or photographs that cannot  
4 be conveniently examined in court.

5 I don't even think we get to that point, Judge,  
6 because we would submit that these are not summaries of  
7 voluminous writings. They are summaries of their expert's  
8 opinion, which they want to have risen or elevated to the  
9 level of an exhibit. And they contain argumentative and  
10 opinion materials, as well.

11 If I could show one, 5356, this is from Dr. Long's  
12 report. It's accused product information, frequency bands,  
13 ports, polarization, and antenna elements. And as I  
14 understand it, Your Honor, the colors that we see here, the  
15 squares drawn around the elements, red circles, there's  
16 some -- it's hard to see on the ELMO. There's some blue  
17 outlining, as well. All of that, I believe, are inputs  
18 from Dr. Long or from counsel that prepared these with  
19 Dr. Long. And it goes throughout the document like that.

20 So it is not, I think, what is classically thought  
21 of as a summary of voluminous records.

22 What I was trying to find a couple of cases --  
23 it's interesting, most of the cases on 1006, if my research  
24 was correct, fall on the criminal side of things. But  
25 there was one case in the Eastern District awhile back with

1 Judge Steger where he allowed a summary in, but it was a  
2 summary of a 94,000-page New Drug Application to the  
3 Federal Drug Administration in a products liability case,  
4 something which I think seems much more at the heart of  
5 what 1006 is designed to get at, not allowing a party to  
6 summarize an expert's arguments. And we --

7 THE COURT: Mr. Findlay, hand me that document. I  
8 can just see a part of one page on the ELMO. I'd like to  
9 look at the entirety of it.

10 MR. FINDLAY: Certainly.

11 THE COURT: All right. I'll hand it back to  
12 Ms. Lockhart, and you can retrieve it from her.

13 MR. FINDLAY: Thank you, Your Honor.

14 THE COURT: Let me hear a response from Plaintiff.

15 MR. STAMATOPOLOUS: So, Your Honor, the document  
16 that Defendants object to is a summary -- we submit is a  
17 proper summary exhibit. It doesn't contain any opinions.  
18 Really what it does is it excerpts information from a  
19 number of different sources that pertain to each of the  
20 accused products, and it presents them in tabular format.

21 So there's -- there's about 85 products in the  
22 case. Each one has three or four associated documents.  
23 And the relevant information in those documents consists of  
24 information, such as the polarization of the array, the  
25 number of ports, the specific arrangement of the antenna

1 elements in an array which can be -- or rather, which can  
2 be gleaned from drawings -- product drawings.

3           So the only thing that is not really a direct  
4 excerpt from one of these types of documents are the  
5 squares and the circles that Mr. Findlay pointed to. And  
6 Fractus suggested yesterday during the meet and confer to  
7 Defendants that we'd be willing to modify the exhibits to  
8 remove those circles and squares and leave the drawing  
9 excerpt in its original form.

10           We think that this would be very helpful to the  
11 jury to summarize the information. This is information  
12 that pertains to each and every one of the accused  
13 products, rather than hand them thousands of pages of  
14 documents -- not 90,000 pages like the case that  
15 Mr. Findlay just discussed, but still several hundreds or  
16 maybe a couple thousand pages.

17           THE COURT: And tell me again what the suggestion  
18 was during the meet and confer.

19           MR. STAMATOPOLOUS: The suggestion was that we  
20 modify the exhibit, such that these circles and squares,  
21 which were our input to show where the various antenna  
22 elements were located on the arrays, that those be removed.

23           THE COURT: Okay.

24           MR. STAMATOPOLOUS: Thank you.

25           THE COURT: Do you have anything else,

1 Mr. Findlay?

2 MR. FINDLAY: Yes, Your Honor. Thank you.

3 The -- the meet and confer comment is correct, but  
4 that's not the only objectionable part -- objectionable  
5 part of the exhibit.

6 THE COURT: I gather not or that would have  
7 resolved it.

8 MR. FINDLAY: Yes, Your Honor. If you look at the  
9 fourth column, dual polarization, for some of the products,  
10 as I understand it, that's an element of a claim, and he's  
11 writing yes through all of that. That seems completely  
12 argumentative. It's not something that ought to be  
13 elevated to the level of evidence. It's fine for them to  
14 use this as a demonstratives exhibit, and they can argue  
15 about it that way, but for that -- for a conclusion like  
16 that to go back to the jury, we don't think is appropriate.

17 And may I test Your Honor's patience with another  
18 exhibit from this bucket?

19 THE COURT: All right.

20 MR. FINDLAY: Thank you.

21 Another one -- and, again, this is from Dr. Long's  
22 report. And this is 5366. And I -- if Your Honor wants to  
23 see this, I can hand it up. It -- it's a printout, it's  
24 too long of a docket to get on an eight and a half by  
25 eleven sheet of paper. But it's looking at different

1 CommScope products, the models, it has specifications, it  
2 has spacing information, but this is also an attempt -- for  
3 all -- for the same reasons that I said for the other  
4 exhibit, it applies here, it's argumentative, it's opinion.  
5 They're also, we believe with this exhibit, trying to  
6 backdoor opinions that are lacking in Dr. Long's report.

7           If you look at Column 3, working frequency band,  
8 he's identifying WCS. And this particular exhibit -- I  
9 want to make sure I get this right -- I believe is a  
10 summary of Appendix 3 from Dr. Long's T-Mobile expert  
11 report.

12           In that appendix in his report, Dr. Long never  
13 identified WCS as a working frequency band for T-Mobile.

14           And there's another exhibit, 5367, which is a  
15 similar exhibit but submitted on behalf of Verizon, if you  
16 will. And similarly there, he identifies WCS as a working  
17 frequency band, yet he never did that in the actual  
18 appendix of his report.

19           So it's summary, it's opinion, it's trying to be  
20 jazzed up as -- as evidence, plus it's adding new opinions,  
21 Your Honor. And these -- obviously, these were not  
22 prepared specifically by Dr. Long, so I think hearsay  
23 applies. And I think it would be prejudicial, as well.

24           THE COURT: Are you aware in any way, Mr. Findlay,  
25 that this is going to be inconsistent with what Dr. Long is

1 going to testify to in open court and with what's otherwise  
2 clearly set out in his report?

3 MR. FINDLAY: With respect to the first one that I  
4 showed you, 5356, no, I don't know of anything that's  
5 inconsistent with that that will be in his testimony.

6 However, with the other one, 5366, that, we  
7 submit, is inconsistent with his report because, again, it  
8 identified this different working frequency band which he  
9 didn't identify as T-Mobile or in T-Mobile or Verizon  
10 products in his report.

11 But -- and I guess, Your Honor, the last thing  
12 I'll say, that goes to our larger point. It's fine for him  
13 to argue this. It's fine for him to show it to the jury,  
14 and they can go through it, but it should be a  
15 demonstrative, not elevated to evidence.

16 THE COURT: Anything further from Plaintiff on  
17 this?

18 MR. STAMATOPOLOUS: Yes, Your Honor. As an  
19 initial matter, the polarization column that Mr. Findlay  
20 pointed to does contain the words -- the word "yes"  
21 throughout. The reason it contains the word "yes"  
22 throughout is because each and every one of the accused  
23 products have data sheets, and each and every one of those  
24 data sheets says that the product has polarization, plus  
25 and minus 45 degrees in each of its arrays and in each of

1 its frequency bands.

2           So all Dr. Long is doing is putting that  
3 information at the very top with a question mark, and then  
4 answering in the affirmative to show that each of the data  
5 sheets has that information in it.

6           Secondly, with respect to the second exhibit that  
7 Mr. Findlay addressed, the Excel sheet of which he showed  
8 you a printout, Dr. Long is not rendering an opinion that  
9 T-Mobile or Verizon are operating in the particular  
10 frequency band, WCS, that Mr. Findlay pointed out. Rather,  
11 Dr. Long is opining that the product, in terms of its  
12 technical -- technical capabilities, can cover that  
13 particular frequency band.

14           So it's really product analysis. It's consistent  
15 with the analysis that he performed earlier in the case in  
16 his reports. There's -- there's no issue of inconsistency  
17 in our opinion.

18           Thank you.

19           MR. TOBIN: Your Honor, may I very, very briefly  
20 offer a quick response to that?

21           THE COURT: On the one hand, I don't want to  
22 curtail anybody. On the other hand, we don't have time for  
23 everybody in the room to go to the podium and put in their  
24 two cents. Understanding I'm not opening the door to that,  
25 counsel, I'll give you just a very brief second to add what

1 you have.

2 MR. TOBIN: I'll be incredibly brief, Your Honor,  
3 and thank you for the indulgence.

4 A few other claim terms that are used in that  
5 chart in the headings are terms like "antenna element,"  
6 "array," "frequency band." Each of those are claim terms,  
7 and so in a sense, this is Dr. Long showing the claim terms  
8 and where the products are.

9 One other issue is that there's an aspect of  
10 cherry picking where he's taking a little piece of this  
11 schematic that's helpful but not other pieces of the  
12 schematic.

13 Thank you, Your Honor.

14 THE COURT: Well, on the one hand, the Court's  
15 acutely aware of the possibility of voluminous documents  
16 being used without the ability to summarize. On the other  
17 hand, I think the requirements of Rule 1006 preclude those  
18 summaries being more than a representation of what's in the  
19 underlying documents. I think what you've shown me falls  
20 slightly on both sides of the line.

21 What I mean by that is the first document you  
22 showed me, I think, with the drawings taken out, as was  
23 proposed, is fine because it appears to be just a summary  
24 of the underlying data and information.

25 The second document appears to contain opinions of

1 the expert which go beyond the underlying substance of the  
2 summarized voluminous documents and falls on the side of  
3 the line that includes argument which is not appropriate  
4 under Rule 1006.

5           So at least as to what you've shown me in this  
6 bucket, the first document with the removal of the drawings  
7 is pre-admitted.

8           The second document with the commentary set forth  
9 therein from the expert, and because of that, is not  
10 pre-admitted.

11           And if you need further guidance on remaining  
12 documents in this group, then you need to tell me. If not,  
13 I'll assume that's adequate, and we'll move on to the next  
14 category.

15           MR. FINDLAY: I think we can take that ruling and  
16 work it out between the parties, Your Honor.

17           MR. WARD: And, Your Honor, we'll -- we'll  
18 certainly meet with the other side and try and figure that  
19 out. I just -- the combination of the last two rulings  
20 with result -- with regard to the test results from the  
21 85 accused products and now the disallowance of some of  
22 these summaries is going to make it difficult with the time  
23 that the Court has allowed to put on an infringement case.

24           The plan was to say, here are the test results,  
25 the impedance patterns from Product X. Did you do that

1 with respect to the other four -- 84 products?

2 Yes, I did.

3 Are those contained in Exhibits 2 through 85?

4 Yes.

5 I mean, those are integral to the infringement  
6 proofs. They were part of the expert report. I understand  
7 your ruling. I just want to know -- it's hard for you to  
8 see where -- in the big picture where these things are  
9 taking us. And I just want to make you aware of that in  
10 case -- when we get together and we might be coming to you  
11 saying we need more time, then, if we're not going to be  
12 able to summarize some of these voluminous documents that  
13 Dr. Long relied upon to establish his infringement proof.

14 THE COURT: Well, on the one hand, you just cut  
15 the case down to one patent. So you should be saved -- you  
16 should have saved some time there. On the other hand, your  
17 expert can testify to everything that's set forth in these  
18 documents. And he can use those documents as a  
19 demonstrative. The only issue here is should they rise to  
20 the level of being admitted as an exhibit in the case.

21 MR. WARD: And --

22 THE COURT: And there, I have to be constrained by  
23 the rules of evidence.

24 MR. WARD: And I understand your ruling, Your  
25 Honor. My only concern is I think we can convey all this

1 information to the jury. They're going to understand it.  
2 But I fear that when this case goes up on appeal, if that's  
3 where it ends up, they're going to say there's no evidence  
4 of infringement with respect to every product because  
5 Dr. Long shorthanded it during his -- his testimony. And  
6 there's not any test result for every product. There's  
7 only one for the one that he discussed. And he said:  
8 Yeah, I did the same for 84 other products.

9 THE COURT: Well, why don't you do this, Mr. Ward?  
10 Why don't you continue to meet and confer with the other  
11 side, because, quite honestly, the objections I heard were  
12 not to the substance of the underlying material. They were  
13 to additional argument and -- and characterization added to  
14 them. And, quite honestly, you may be able to work this  
15 out to where they are pre-admitted if you remove those  
16 offending categories or columns. That's really why I've  
17 granted the objections I've granted.

18 MR. WARD: I hear you, Your Honor. And we'll  
19 continue to work on that.

20 THE COURT: Okay. Well, barring something  
21 different, that's the Court's ruling on this category.

22 What's the next category? Is this 27?

23 MR. FINDLAY: Yes, it is, Your Honor.

24 THE COURT: Okay.

25 MR. BARTON: Ross Barton, Your Honor, on behalf of

1 the Defendants.

2           This is a different type of expert summary problem  
3 that we have. There are two specific documents that fall  
4 into this bucket. They are two one-page documents, and  
5 they're marked highly confidential.

6           So instead of publishing on the ELMO, I'm happy to  
7 approach and give you copies for the purposes of this  
8 discussion, Your Honor.

9           THE COURT: You may approach.

10          MR. BARTON: So, Your Honor, taking PX-5086 for  
11 purposes of -- of this discussion as the exemplar, this is  
12 a document that was produced to us after the close of fact  
13 discovery, after the close of expert discovery in  
14 connection with an opposition to a Daubert motion.

15          THE COURT: Do you have an additional copy you can  
16 put on the ELMO?

17          MR. BARTON: I do.

18          THE COURT: I mean, these are just two single  
19 pages.

20          MR. BARTON: And if I could -- well, you know,  
21 let's just -- we'll -- we can do it for Verizon. I'll  
22 allow it to be published for purposes of this discussion,  
23 Your Honor. If it's moved into the record, we may need to,  
24 you know, seal the courtroom if there's going to be  
25 testimony about this just because the numbers on the

1 right-hand side.

2 THE COURT: Well, I don't see any witnesses here.  
3 I don't expect any testimony. There might be some  
4 argument, but there's not going to be any testimony.

5 MR. BARTON: Fair enough.

6 So, Your Honor, what we're dealing with here is  
7 summary data that was apparently produced or prepared by  
8 Dr. Mills. And Dr. Mills is Fractus's damages expert.  
9 This was not part of his report. He did not discuss the  
10 ATOLL data. And when I say ATOLL, ATOLL is a database.  
11 It's a tool that Verizon has that keeps track with varying  
12 degrees of accuracy of the things that are employed in  
13 Verizon's network. It is voluminous. We would agree with  
14 that. There are about 116 different documents -- Excel  
15 spreadsheets that were produced in this case, with as many  
16 as 370 columns per spreadsheet and tens of thousands of  
17 entries.

18 And what we have here is a document that was given  
19 to us, and it turns out that it was prepared by Mr. Mills.  
20 We only found out about that when they told us that in an  
21 opposition to one of our motions in limine.

22 What Mr. Mills purports to have done here is to  
23 take information from the ATOLL database and show there,  
24 for example, in Column -- or Row 1, the number of accused  
25 antennas that operate both AWS and PCS frequency bands.

1 And then he has an antenna count on the right-hand column.

2 There's a number of issues with this, Your Honor.

3 First, Federal Rule 1006 is a summary to prove content.

4 And I think when you look at the instances in which

5 summaries are properly used, those are instances where

6 there are, for instance, voluminous sales invoices that

7 show units sold, things of that nature. And someone has

8 gone through, aggregated those up, and then uses that to

9 summarize the data.

10 That's not what's shown here. That -- Row 1, Row

11 2, Row 3, those are not fields in the ATOLL database.

12 Those are -- those reflect Dr. -- or Mr. Mills's

13 conclusions regarding what the ATOLL database shows.

14 THE COURT: Isn't -- isn't Mr. Mills going to

15 testify both as a fact witness and as an expert witness in

16 this case, and is this going to fall within his expert

17 testimony, or is this going to fall within his fact

18 testimony?

19 MR. BARTON: It cannot fall within his expert

20 testimony, Your Honor, because he did not discuss this in

21 his expert report. This would be outside the scope of his

22 report.

23 THE COURT: So this will be presented when he

24 testifies as a fact witness?

25 MR. BARTON: That is their theory, although it's

1 unclear how he can possibly testify as a percipient fact  
2 witness as to how Verizon's network is deployed and what  
3 the contents of these documents that were produced by  
4 Verizon actually show.

5 THE COURT: He's not going to be able to say I  
6 counted the number of these, and that's how I got 87,782?

7 MR. BARTON: If --

8 THE COURT: And say I looked through all the  
9 voluminous documents, and I counted them, and this is what  
10 the -- is reflected.

11 MR. BARTON: Your Honor, there are judgment calls  
12 reflected in here, and those judgment calls were pushed out  
13 into the area of expert testimony. This is not simple  
14 facts.

15 And -- and to get to that point, Your Honor, we  
16 tried to reproduce this. We tried to go through and see if  
17 we could get to the same numbers, if there was any way to  
18 do that. And not only could we not get to those numbers,  
19 we couldn't even figure out how to begin to do that, right?  
20 This is not something where he just went through and  
21 counted because these are not fields that exist.

22 And -- and one point that I would make with  
23 respect to this document, is you see there the source down  
24 at the bottom. He identifies the two things, one is the  
25 ATOLL spreadsheets produced by Verizon, which is a Bates

1 range. And then two is a transcript deposition of Nicholas  
2 Cordaro. So he's having to take some information provided  
3 to him in the deposition transcript of a Verizon employee,  
4 apply that, and then make judgment calls based on the  
5 contents of this document. That is not fact testimony,  
6 Your Honor. That is expert testimony.

7 And another thing that I would point out, Your  
8 Honor, is this is not a document that was produced to us  
9 during discovery. It was not produced to us prior to  
10 Mr. Mills's deposition.

11 So we had no opportunity to examine him on how he  
12 got to this set of values, how he figured out what he was  
13 counting, and what he wasn't counting.

14 And, for example, Your Honor, I think it's  
15 important to note, in the ATOLL database, for example,  
16 there are thousands of rows of entries that are identified  
17 as junk or decommissioned. We have no idea if he counted  
18 those. It's not clear to us. If he did, those are very  
19 problematic. But, again, we never had an opportunity to  
20 depose him on that.

21 One additional issue, I would say, Your Honor,  
22 with respect to T-Mobile is there's Document 5085. And for  
23 the source data that he identified on that exhibit, in his  
24 deposition, Mr. Mills, when testifying about the data that  
25 T-Mobile had previously produced that he then subsequently

1 used as a source in this document that was created after  
2 his deposition, he testified that that data was not  
3 reliable.

4           And so it strikes us as -- as deeply problematic  
5 for him to say now I'm fact witness and I can provide you  
6 my opinion about Verizon's network or T-Mobile's network  
7 and their documents as a fact witness without having to  
8 demonstrate that he has any basis to testify as a fact  
9 witness or giving us any opportunity to cross-examine him  
10 on how he made the decisions he had to make in order to  
11 come up with these numbers.

12           THE COURT: All right. Let me hear from the  
13 Plaintiff.

14           MR. SAUTER: Ben Sauter from Kobre Kim.

15           THE COURT: Go ahead, counsel.

16           MR. SAUTER: So just to begin, I'm going to walk  
17 the Court through exactly how these were calculated so that  
18 the Court and Your Honor can see how they are, in fact,  
19 summaries of massive spreadsheets. But before I do, some  
20 background will be helpful, and I want to also put these  
21 spreadsheets in context.

22           So the underlying data on which these summary  
23 exhibits are based are not objected to. So Verizon agrees  
24 that they can come in as marked exhibits. The catch is  
25 there is no way -- it is impossible to present

1 understandable evidence about how the carriers are actually  
2 using the antennas in these spreadsheets without doing a  
3 summary exhibit, impossible.

4           So they will be in the record. They will be  
5 there, relevant critical evidence that goes directly to the  
6 heart of the defense that they are asserting in the damages  
7 case, and I'm going to get to some more of this when I get  
8 to the background, but they are saying, we don't use  
9 antennas in the way that Mr. Mills is saying we use them.

10           There is evidence in the record that they don't  
11 object to that contradicts that, but there is absolutely no  
12 way to convey that information to the jury without  
13 presenting a summary exhibit.

14           Now, by way of background, I'm going to explain  
15 why this exhibit was created when it was because I --  
16 because it's important.

17           So we asked in discovery, and Verizon had an  
18 obligation to produce independently of that, information  
19 that was relevant to this case. We asked them in  
20 interrogatories to identify for us information about how  
21 Verizon deploys antennas on its network.

22           What it produced to us initially were these ATOLL  
23 spreadsheets, hundreds of them, all of them massive. Okay.  
24 We got to a 30(b)(6) witness deposition of Verizon and were  
25 told he would be able to answer questions about these

1 spreadsheets.

2           As it turned out, he wasn't. He said -- and I  
3 have some quotes. You know, I don't know how these  
4 spreadsheets were compiled. He said: I can't vouch for  
5 their accuracy. So we asked on the record for the complete  
6 spreadsheets. They were -- and what was produced to us,  
7 some of the columns -- and I'm going to explain to the  
8 Court in a minute -- actually weren't filled out in the  
9 initial spreadsheets that were given to us.

10           So there wasn't much we could do with those  
11 initial spreadsheets. They dragged their feet.

12           We eventually got the updated spreadsheets with  
13 all the data after Mr. Cordaro, the 30(b)(6) witness had  
14 testified. So we weren't able to ask any questions about  
15 them. We got them about a week before Mr. Mills's expert  
16 report was due. We just -- I can't emphasize how big --  
17 they crash computers, they're so big.

18           So these spreadsheets weren't done before his  
19 report was completed.

20           Fast forward to the Daubert briefing in this case.  
21 For the first time -- this argument never raised in any of  
22 the fact depositions that were taken. For the first time,  
23 the Defendants file a Daubert motion saying Mr. Mills's  
24 testimony should be excluded because it doesn't include  
25 information about how the Defendants actually use antennas

1 on their network and that they use them on multiple  
2 frequency bands at the same time.

3 Not only that, in CommScope's Daubert brief, they  
4 say in a footnote, oh, and I understand the carriers are  
5 going to produce their information about this and file  
6 their own Daubert briefs contradicting it. In fact,  
7 there's actual evidence in the record that shows the  
8 carriers don't deploy their antennas.

9 Well, that actually never happened. The carriers  
10 haven't put forth any of that evidence. Okay. The only  
11 evidence that I'm aware of that goes to this at all is the  
12 testimony of Mr. Zimmerman which we've already been through  
13 and these spreadsheets, okay?

14 So in response to the factual contention in the  
15 Daubert briefing that there was no evidence in the record,  
16 and, in fact, the evidence contradicts our argument -- or  
17 damages position that the carriers are using antennas on  
18 multiple frequency bands. We said: Hey, is that right?  
19 Is that really right?

20 So we went through these spreadsheets that we got  
21 after Mr. Cordaro testified, right before Mr. Mills's  
22 expert opinion was produced. We went back and looked at  
23 them. This summary exhibit is the result of that. We put  
24 it together quickly in the context of that Daubert, not as  
25 a -- to fix a Daubert issue, us trying to check the facts

1 of what they alleged in their Daubert briefs. And we made  
2 this exhibit. That's the background with Mr. Mills.

3 We are not proposing to put it in. We're not  
4 trying to confuse the jury that this is expert testimony  
5 that he's opining on anything. The subjective opinion --

6 THE COURT: Mr. Mills is a damages guy, right?

7 MR. SAUTER: Mr. Mills is our damages expert,  
8 that -- that's correct. He's also somebody who is able to  
9 compile these spreadsheets in a way that doesn't require  
10 any particular expertise, but it's a massive project, and  
11 he was able to do that.

12 THE COURT: I guess my point is, I'd be more  
13 suspect if he were a technical person than as an outsider,  
14 quote, unquote, who doesn't do this who went through the  
15 spreadsheets and made the calculations that are reflected  
16 in this summary.

17 Go ahead -- go ahead and continue with your  
18 argument.

19 MR. SAUTER: Okay. So just so Your Honor can -- I  
20 think it's important. I'm happy to -- to -- to explain for  
21 Your Honor just -- just how we put it together.

22 So I don't have the entire spreadsheet here, but I  
23 can show --

24 THE COURT: Let me ask you this. Are the  
25 underlying spreadsheets going to be pre-admitted and used

1 as exhibits in the trial?

2 MR. SAUTER: We agreed to that last night.

3 There's no objection to the underlying exhibits, that's  
4 correct.

5 My point is it is many hundreds of them that  
6 can't -- yes.

7 THE COURT: I'm not asking about either/or. I'm  
8 asking about will we have both here?

9 MR. SAUTER: Yes, Your Honor.

10 THE COURT: Okay. Go ahead.

11 MR. SAUTER: This is -- as you can see, from the  
12 column headers at the top of this document, I have, just  
13 for purposes of illustration here, taken out some different  
14 columns, because, like I said, it's hundreds of columns  
15 long. These are the relevant columns for -- for these  
16 purposes.

17 One of the columns, Column A in these spreadsheets  
18 says: Site Name. You see some numbers, and you see some  
19 letters. That's the identifier of a site, a particular  
20 AT&T or a Verizon site. The tower that you see on the side  
21 of the road, that's what they call it.

22 Okay. Next to that there's an Antenna Model, a  
23 given name, so SBNHH-1D45A, that's an accused antenna model  
24 in this case. I'm going to explain in just a moment how I  
25 got to these, walking through it. Antenna model identifies

1 a particular antenna model. And not only that, it  
2 identifies a particular port within that antenna.

3           The next column over, Antenna Altitude, it gives a  
4 very precise GPS coordinate of the antenna's altitude, a  
5 precise coordinate of the antenna's longitude, precise  
6 coordinate of the antenna's altitude, the sector in which  
7 the antenna is located. The sector refers to whether it --  
8 usually these antenna sites are -- you have one antenna --  
9 there's three sides. There's one, you know, north, one  
10 west, one east.

11           So sectors -- what they call Sector 1, so you know  
12 it's sort of on that same plane. And the last column says  
13 Band Class where they plug in a value of a particular  
14 frequency band.

15           So I'm going to try to circle right there where my  
16 arrow is, an Excel spreadsheet, if you click that, you can  
17 filter. So what you can do with these spreadsheets is you  
18 can say I want to just look at what's going to at site name  
19 N -- 0239 NM1\_TAOSDT, that first segment in there. You can  
20 filter down and just see whatever is happening there. And  
21 after you do that, you can find -- you can figure out if  
22 there's an accused antenna, and as it turns out in this  
23 particular case, there is.

24           And after you do that, you can filter, and you can  
25 say, well, I want to know all the antennas that are at a

1 particular latitude, longitude, altitude, sector.

2           So as you see here, you actually -- you have two  
3 rows -- site name -- you have two rows for this TAOSOT  
4 [sic]. Two -- the exact same antenna model, exact same  
5 Port 6, exact same antenna altitude, exact same longitude,  
6 exact same latitude, exact same sector. The only  
7 difference, one is PCS and one is AWS.

8           So all he has done -- he has just said that's --  
9 that's his example of this exact same antenna, exact same  
10 port being used on two different frequency bands. He's  
11 counted them up. Nothing else.

12           I will stop there and answer any questions that  
13 Your Honor has. The T-Mobile summary exhibit is a little  
14 bit different, so I can walk through how we calculated that  
15 one, as well, if Your Honor would like.

16           THE COURT: Let me ask you this. If the  
17 underlying spreadsheets are admitted as pre-admitted  
18 exhibits and if they're available and used as exhibits at  
19 the trial, and then this is used by Mr. Mills to explain to  
20 the jury what he came up with from those stacks of  
21 spreadsheets, how does that harm you if this is used as a  
22 demonstrative rather than an exhibit?

23           You have the underlying data. It's in the record.  
24 You don't have a problem with proof. And yet instead of  
25 being forced to flip page after page after page of

1 thousands of sheets, you have as a demonstrative the  
2 ability for him to testify as to what he did based on  
3 those.

4 And by the same token, with them being  
5 pre-admitted in the case, the other side can use them if  
6 they think it's appropriate to cross-examine him on what  
7 he's testified to from this summary sheet as a  
8 demonstrative.

9 I'm asking Plaintiff how -- how is it materially  
10 different for you if this is pre-admitted as an exhibit as  
11 opposed to if it's used as a demonstrative in conjunction  
12 with the underlying data spreadsheets?

13 MR. SAUTER: Your Honor, I think that --

14 THE COURT: Is it -- is it really any different?

15 MR. SAUTER: No, I think that would be acceptable,  
16 Your Honor. He could testify as to what he did based on  
17 those exhibits and this would illustrate his conclusions.

18 THE COURT: What about Defendants?

19 MR. BARTON: Well, Your Honor, the problem we have  
20 with that is he didn't do this in his report. This is the  
21 first time -- this four-step or however many step  
22 methodology that Mr. Sauter just went through, this is the  
23 first time we've seen this. This is not in his report. He  
24 didn't go through the ATOLL data, and so --

25 THE COURT: This is not -- this is not opinion

1 testimony. This is factual evidence of I took these  
2 spreadsheets. I went through them sheet-by-sheet-by-sheet.  
3 This is what I -- this is what I did. This is what I  
4 counted. And that's what's shown on this demonstrative.  
5 That's not an opinion. That's not required to be in his  
6 expert report.

7 MR. BARTON: With respect, Your Honor, we -- we  
8 believe it is opinion because we were not able to get to  
9 the same results. This is not something -- there are  
10 judgment calls made all along the way. This is not simply  
11 tabulating certain rows and certain fields and coming out  
12 with, you know, the number of units sold, for example.

13 This is, as Mr. Sauter just explained, a  
14 multi-step process where there were decisions applied along  
15 the way to include or exclude certain things. And if  
16 Mr. Mills was a fact witness, I would say that they should  
17 have identified him in their 26(a)(1) disclosures as a fact  
18 witness. They never did that. He's always been offered  
19 only as an expert witness. And he never provided any  
20 opinion testimony as to this.

21 If they wanted Mr. Mills to do this, and you heard  
22 Mr. Sauter go through and describe the process by which he  
23 believes we got to this point, they could have sought to  
24 compel the deposition of Mr. Cordaro again. They didn't do  
25 that. They could have moved for leave to supplement

1 Mr. Mills's report. They didn't do that.

2           Instead, they want to come in here with an exhibit  
3 that they're offering as a factual exhibit, based on a  
4 series of steps and methodology that Mr. Mills applied that  
5 we don't understand. It does not appear to be kind of a  
6 straightforward methodology.

7           We have no problem, Your Honor, because the ATOLL  
8 data is coming in, right? It's been pre-admitted. That  
9 if -- if a witness gets up for the Defendants and says,  
10 well, they don't have evidence of X, then they can use the  
11 ATOLL data to impeach that witness and say: Well, in fact,  
12 the evidence shows Y, right? That's fine.

13           But for their expert to stand up and affirmatively  
14 say here's what the evidence shows, even though he never  
15 evaluated that evidence or provided any analysis of it in  
16 his report, we think that's improper.

17           THE COURT: Let me -- let me ask Plaintiff this.

18           Procedurally, is this testimony going to be  
19 elicited from Mr. Mills at the same time he's offering his  
20 expert testimony as a damages expert in this case, or are  
21 you going to call him as a fact witness to go through his  
22 non-expert testimony and then later in the case call him as  
23 an expert witness to put on his damages expert testimony?

24           MR. SAUTER: The latter, Your Honor. And I also  
25 want to just make one very quick clarification, which is

1 the T-Mobile exhibit -- T-Mobile actually reached out to us  
2 after we did this, and we walked them through how we  
3 calculated it. Verizon did not do that. So they have had  
4 this exhibit for some time, and they have made a strategic  
5 decision to not ask us about it.

6 THE COURT: Gentlemen, I don't want to get into  
7 bickering about what one side did and didn't do and so  
8 forth and so on. I think I've heard enough.

9 Based on the premise that the underlying  
10 spreadsheets are without objection pre-admitted and can be  
11 shown to the witness during the trial in which they will  
12 become exhibits in the record, I -- and based on -- based  
13 on that, I see no problem with the witness using these two  
14 sheets as summaries of those voluminous records.

15 I think it's also helpful that he's going to be  
16 actually on the witness stand at two different times during  
17 the trial, so there'll be -- there'll be less possibility  
18 of any confusion about this being offered as expert  
19 testimony as opposed to fact testimony.

20 I do think for whatever reason Defendants should  
21 have had an opportunity to depose Mr. Mills on this  
22 particular item.

23 I'm going to -- I'm going to pre-admit PX-5086 and  
24 5085, and I'm going to order Plaintiffs to make Mr. Mills  
25 available for a one-hour deposition between now and the

1 time of jury selection, limited to these exhibits and the  
2 underlying databases and spreadsheets that he used to  
3 create these. All right?

4 MR. BARTON: Thank you, Your Honor.

5 THE COURT: Bucket 41 is next, carrier purchase  
6 contracts. Let me hear from Defendants on this.

7 MR. FINDLAY: Thank you, Your Honor.

8 This, to some extent, deals with the motion in  
9 limine that we had filed on indemnification. Your Honor  
10 granted that as to liability that they not -- that the  
11 Plaintiffs can't argue indemnification somehow equals  
12 liability but denied it with some caution with respect to  
13 possible mischief or anything like that. And I don't want  
14 to reargue that.

15 The two exhibits here -- and they are 4277 and  
16 4788 -- are agreements between CommScope or prior companies  
17 in interest and the carriers, one Verizon, one T-Mobile.

18 Plaintiffs seek to move these into evidence. We  
19 think they are irrelevant, and we think they are highly  
20 prejudicial for a lot of the reasons that I indicated in my  
21 argument on the motion in limine, which I won't repeat all  
22 those.

23 But in addition to the indemnification, which I'd  
24 like to show you in the agreement, there are other parts of  
25 the agreement which I think would be incredibly prejudicial

1 if it were allowed into evidence.

2 And I can do it on the screen here. This is --  
3 it's VoiceStream Wireless and Andrew Corporation, but I  
4 understand those are actually T-Mobile and CommScope in  
5 terms of party of interest.

6 But, again, we don't think it's relevant to any  
7 issues in the case. And if you look down at some of the  
8 language, even in addition to indemnification, there are  
9 issues with large numbers thrown all around. There's --  
10 and we have the same problem. I don't know if I want to  
11 get into too much detail with the numbers, Your Honor. You  
12 can probably see them on the screen there. I was going to  
13 highlight them for you, but I won't to do that because it's  
14 highly confidential.

15 But big numbers are thrown around for no relevant  
16 reason whatsoever. We would be concerned that that's what  
17 would happen. Jury sees these numbers.

18 And then just scrolling down farther, we get into  
19 indemnification --

20 THE COURT: Have you discussed -- have you  
21 discussed with opposing counsel redacting those large  
22 numbers?

23 MR. FINDLAY: No, we have not, Your Honor,  
24 because --

25 MR. WARD: I'm sorry, Mr. Findlay.

1 MR. FINDLAY: Go ahead.

2 MR. WARD: We recall making that offer last night.  
3 There was a lot going on. We're interested in the  
4 indemnity provisions of the contract, so --

5 MR. FINDLAY: And I apologize.

6 MR. WARD: That's okay. That's --

7 MR. FINDLAY: I may have -- I may have missed that  
8 part.

9 THE COURT: So there's no problem from Plaintiff's  
10 standpoint in redacting the numbers in the pricing section?

11 MR. WARD: Correct, Your Honor.

12 MR. FINDLAY: Well, that -- that helps. Thank  
13 you, Mr. Ward.

14 THE COURT: Does that solve the problem,  
15 Mr. Findlay, or are there still more problems?

16 MR. FINDLAY: No, there's still more problems,  
17 Your Honor. You -- you did deny the motion in limine, and  
18 I don't want to contradict myself on what I said a second  
19 ago. You denied the motion in limine and are going to  
20 allow them to talk about indemnification and the  
21 relationship between the parties generally.

22 This will just be in addition to -- we think not  
23 relevant, prejudicial. It's going to be cumulative.  
24 There's nothing in here which the parties won't hear about.  
25 And, again, just not to belabor the point, but there are --

1 there's a paragraph about infringement indemnity which  
2 specifically talks about patent infringement cases.  
3 There's another paragraph about indemnification in general.  
4 It talks about we'll come in and take care of everything,  
5 we'll pay for everything, you have some rights, et cetera.

6           We go down even farther, there's a whole paragraph  
7 on insurance. If the jury sees that -- well, maybe this is  
8 speculation, but a concern that I would have, if a jury  
9 sees that agreement, somebody starts reading insurance,  
10 somebody thinks, oh, heck, you know what, there must be  
11 insurance for this somewhere. There's an insurance company  
12 that's going to pay the damages for this patent  
13 infringement that might arise.

14           It's just -- it's ramp with possibilities -- or  
15 ripe with possibilities of confusion and doesn't add  
16 anything substantive to their case. You told them they can  
17 tell the story of the fact that we are indemnifying them  
18 and the relationship between the parties.

19           So at the very least, I think I would request that  
20 it not be pre-admitted. If they have a witness on the  
21 stand and they think it somehow becomes relevant to  
22 something, perhaps they can approach, or I would suggest  
23 they approach and we can have that discussion at the bench,  
24 but I don't think it's appropriate to pre-admit these.

25           Thank you, Your Honor.

1 THE COURT: What's the Plaintiff's response?

2 MR. WARD: Your Honor, maybe he didn't hear me. I  
3 know we were talking about several things.

4 We're interested in the indemnity provisions. He  
5 cited the two provisions that we're interested in showing  
6 the jury. We can redact the entirety of the rest of the  
7 document. We're interested in infringement, and it goes  
8 hand in -- hand-in-hand with the indemnification, those  
9 two -- it's indemnity for infringement, and then there's  
10 another section dealing with indemnification. And I'm  
11 referring to PX-4788, and it's representative of the other  
12 documents that are in this bucket.

13 Your Honor has denied the limine. It is evidence  
14 that is relevant to show bias. And, yes, we could get that  
15 testimony potentially from a corporate representative  
16 called adversely from any of the parties to this case, but  
17 we should be able to rely upon the documentary evidence  
18 that -- that shows that fact, that shows the bias that is  
19 potentially present, and the jury should be able to  
20 consider that.

21 THE COURT: All right. I'm going to pre-admit  
22 these documents. I'm going to order that any numerical  
23 amounts in the pricing section be redacted, and I'm going  
24 to order that the entirety of the Paragraph 14 on insurance  
25 be redacted. Otherwise, the document is pre-admitted.

1 MR. FINDLAY: Thank you, Your Honor.

2 THE COURT: Okay. Are we ready to move to  
3 Plaintiff's objections as to Defendants' exhibits?

4 MS. RUIZ: We are, Your Honor.

5 THE COURT: All right. Let's start with the first  
6 bucket on non-party technical documents. And let me hear  
7 from Plaintiff as to their objections concerning the same.

8 MS. RUIZ: Gabriela Ruiz for Fractus, Your Honor.

9 There's only one document at issue here, Your  
10 Honor. This is a sheet with specifications for -- a sheet  
11 with specifications for an Allgon antenna that -- Allgon is  
12 a non-party here, Your Honor.

13 Our objection is hearsay. There's -- this  
14 document was presented by -- it was used with an AT&T  
15 witness in deposition, but it's not an AT&T document, and  
16 there hasn't been any witness to overcome a hearsay  
17 objection for business records or any other reason.

18 THE COURT: What's Defendants' response?

19 MR. BREMER: Your Honor, Dennis Bremer.

20 AT&T's witness under 30(b)(6) capacity was deposed  
21 in connection with several topics, one of which was his  
22 knowledge because he was there at the time of AT&T's use of  
23 antennas on different bands, the low band and the high  
24 band, which he testified that was done in the -- certainly  
25 by 1999. And when asked what basis he had other than his

1 personal knowledge from being there at the time, he  
2 identified this document that from their files -- an Allgon  
3 document. Allgon is a supplier of antennas, Your Honor.

4 In fact, Mr. Lindmark, who was associated with the  
5 Lindmark NRS reference in connection with summary judgment  
6 motions a couple weeks ago, worked at Allgon at this time  
7 period.

8 But the witness testified that these came from the  
9 AT&T files, had a date mark in their files of 1999, and he  
10 pointed to that as proof as it were that they were  
11 employing using antennas and two bands. That's what we  
12 intend to use it for, not that this particular antenna  
13 worked that way. But that's what happened.

14 And we anticipate -- if necessary, if it can't be  
15 pre-admitted, that perhaps we'd be able to authenticate  
16 that in connection with Mr. Lindmark's testimony.

17 THE COURT: All right.

18 MS. RUIZ: Your Honor, may I add something?

19 THE COURT: You may.

20 MS. RUIZ: Your Honor, I'll note that the patterns  
21 here are the same kind of patterns that the Court excluded  
22 from Dr. Long's testing results. They're  
23 machine-generated. There's been -- in this situation,  
24 there's been no one to testify in deposition as to the  
25 reliability of -- of those results.

1           And, again, Your Honor, I just reiterate that just  
2 the fact that this document was in AT&T files does not make  
3 it an AT&T business record. And there was no -- it was  
4 not -- there were no questions in deposition, even if it  
5 had been in an AT&T record, to establish it as a -- as a  
6 business record for the hearsay exception, Your Honor.

7           THE COURT: All right. I'm going to sustain the  
8 objection. I think that's consistent with my ruling on the  
9 other side, and I think there's a risk of confusion,  
10 whether it's AT&T or this other entity, being shown to the  
11 jury.

12           Anyway, it's -- it's -- it's not pre-admitted.

13           Let's go to Category 10. That should already be  
14 covered, is it not? I'm told it would rise and fall with  
15 the other ruling.

16           MR. BREMER: Yes, Your Honor.

17           THE COURT: Okay. So consistent with the other  
18 ruling, those documents are not pre-admitted.

19           Everyone agree with that?

20           MR. BREMER: Yes.

21           MS. RUIZ: Yes, Your Honor.

22           MR. STAMATOPOLOUS: Yes, Your Honor.

23           THE COURT: Okay. Then that brings us to Category  
24 18 of Defendants' exhibits, patents by Fractus or owned by  
25 Fractus.

1           Let me hear from Plaintiff's counsel on this.

2           MR. STAMATOPOLOUS: Thank you, Your Honor.

3           There is one document in this category, DX-301 out  
4 of the '206 patent. This is a patent that's been -- it's a  
5 Fractus patent. It describes a type of antenna array. And  
6 it came after -- it was issued after the patents that are  
7 at issue -- or rather the patent that is at issue in the  
8 case right now.

9           It contains language that says that the dual band  
10 behavior to which the array of the patent is directed is  
11 difficult to attain for a particular frequency ratio.

12           And the concern is that Defendants are going to  
13 use this language to challenge -- to pose a written  
14 description challenge to the -- to the Fractus patent at  
15 issue in the case.

16           Now, the standard for written description is  
17 whether a person -- a person of ordinary skill in the art  
18 would recognize that Fractus possessed the claimed  
19 invention based on the four corners of the specification of  
20 the patent at issue --

21           THE COURT: Just -- just to clarify, counsel, this  
22 is not an elected prior art reference?

23           MR. STAMATOPOLOUS: No, it is not, Your Honor.

24           THE COURT: Okay.

25           MR. STAMATOPOLOUS: And so there's -- there's

1 precedent for that. There's Federal Circuit precedent.

2 And it's on this basis that we are objecting, that the  
3 prejudice of this document outweighs its probative value.

4 And, of course, its relevance, as well.

5 THE COURT: 402/403. Anything else?

6 MR. STAMATOPOLOUS: That's it.

7 THE COURT: Let me hear a response from Defendant.

8 MR. TOBIN: Good morning, Your Honor. David Tobin  
9 for Defendants.

10 First off, I'm happy -- it looks like they've  
11 withdrawn their hearsay objection, which is -- which is  
12 good. But, yes, it is one document.

13 And, Mr. Patterson, could you put it up on the  
14 screen, please? It's Document No. DX-1457.

15 And, Your Honor, a couple of things. So to deal  
16 with the relevance issue, first off, I'll note that this is  
17 another Fractus patent. It's by -- if you look at the  
18 first inventor here, it's Carles Puente Baliarda, who is  
19 the named inventor. Fractus was coming to trial -- testify  
20 as their -- as their corporate witness. And the -- it is  
21 squarely relevant for written description, Your Honor.

22 The Defendants' experts, including Mr. Acampora,  
23 have cited to this document multiple times as evidence of  
24 lack of written description.

25 This document was filed after the patents-in-suit,

1 and it actually criticizes the patents-in-suit and some of  
2 the shortcomings in the patents-in-suit. It specifically  
3 mentions the family of -- of the patents-in-suit and talks  
4 about what their -- some of the disadvantages of that  
5 patent.

6 So it's a statement by Fractus -- by Mr. Puente in  
7 a government-issued document and is squarely relevant to  
8 the written description issue, Your Honor, and enablement.

9 THE COURT: Show me the section of this that  
10 criticizes directly.

11 MR. TOBIN: Yes, Your Honor.

12 Mr. Patterson, I think, it's on Page -- around  
13 Column -- around Column 2 at the bottom. Can you scroll up  
14 a couple of pages, please? Can you -- I'm sorry, zoom --  
15 zoom out?

16 I'm sorry, Your Honor.

17 I think it may be around Column -- let me go --  
18 can I be -- it's hard to see it on this, Your Honor. May I  
19 be excused for a moment?

20 THE COURT: You -- you may.

21 MR. TOBIN: Sorry to waste your time. Thank you.

22 Your Honor, thank you for your indulgence. I  
23 apologize for that.

24 But we are looking at -- I believe this is Column  
25 2, around Lines 25 to 27, Your Honor. And this document

1 was directly addressed in the expert reports, and it was  
2 brought up at the deposition of their corporate witness,  
3 Dr. Puente. It wasn't challenged then, but the part I'm  
4 looking at is around Line 26, Column 2. Do you see, Your  
5 Honor, where it says PCT/ES/99/00343? That's the parent  
6 application that led to all the asserted interlaced patents  
7 in this case. And it talks about how it is difficult to  
8 achieve a dual band behavior following the description of  
9 the family of the patents-in-suit.

10 And one of the arguments that had been raised by  
11 Defendants' experts, Your Honor, using this document  
12 multiple times, have not been challenged, is that the  
13 patents-in-suit do not enable and do not provide written  
14 description for multiband behavior using the teachings of  
15 that patent.

16 And this is a Fractus admission about the  
17 teachings of its own patent that has been discussed  
18 multiple times in the Defendants' expert reports. And this  
19 is really, I think, Your Honor, an attempt to challenge  
20 some of the expert opinions at this late stage that have  
21 not been challenged before.

22 THE COURT: I didn't follow that. An attempt by  
23 whom to challenge expert opinions that haven't been  
24 challenged before?

25 MR. TOBIN: I'm sorry, Your Honor, for -- for

1 not -- an attempt by Fractus. Again, this specific passage  
2 wasn't just cited in a footnote of some expert reports,  
3 Your Honor, it was discussed repeatedly in the text of  
4 Defendants' invalidity expert reports for written  
5 description and enablement -- lack of enablement.

6 THE COURT: Do you have anything else for me?

7 MR. TOBIN: Not at this time, Your Honor.

8 THE COURT: Does Plaintiff have anything else on  
9 this?

10 MR. STAMATOPOLOUS: Your Honor, Defendants'  
11 experts can certainly testify using the document to show  
12 that it was difficult to attain multiband behavior, dual  
13 band behavior using the Fractus patent at issue in the  
14 case.

15 However, it would be extremely prejudicial to  
16 actually admit this document into evidence that the jury  
17 can then go back to and use this somewhat, we submit, if  
18 not cryptic, then definitely not conclusive statement as to  
19 whether the patents -- or rather the claimed inventions are  
20 enabled in the patent.

21 Thank you.

22 THE COURT: I'm going to sustain the objection.  
23 This is not pre-admitted. It can be used by the expert as  
24 a demonstrative during their testimony. I think there is  
25 some risk of confusion to the jury, given that this is a

1 Fractus patent and the lawsuit is based upon a Fractus  
2 patent. I don't find it to be unusual that a later patent  
3 would say it's an improvement on what came before it. I  
4 don't think that's necessarily relevant to whether or not  
5 the prior patent meets the enablement and written  
6 description requirements of the Patent Act.

7           So I think there is some reduced, if more than  
8 minimal relevance. I think there's some risk of confusion,  
9 and I don't think the Defendant is materially prejudiced by  
10 using it only as a demonstrative rather than to admit it as  
11 an exhibit. So for those reasons, at least, I'll sustain  
12 the objection.

13           All right. Are there other exhibits in dispute  
14 that we've not taken up and considered?

15           MR. BREMER: I think not, Your Honor. But may I  
16 consult with my colleague?

17           THE COURT: Please consult. It's better to find  
18 out now than later.

19           Counsel, do you need some more time, or do we know  
20 where we are?

21           MS. RUIZ: Your Honor, may I --

22           THE COURT: Please.

23           MS. RUIZ: Your Honor, we don't have any further  
24 disputes for the Court to take up on the exhibits.

25           We just wanted to clarify that on the meet and

1 confer last night, the parties entered into several  
2 agreements to resolve the buckets, and so we're going to be  
3 working together to -- to -- to put -- to put together our  
4 exhibit list, make sure they're accurate, exchange them,  
5 that we're complying with those agreements with each other.

6           There are a couple of agreements that I'd like to  
7 put on the record, if that's acceptable to the Court.

8           THE COURT: All right. What agreements do you  
9 have?

10           MS. RUIZ: On -- on Bucket -- let's see, Bucket 12  
11 of Plaintiff's objections to Defendants' exhibits, those  
12 were the Fractus claim charts. There were certain exhibits  
13 in there that were claim charts for the -- the Samsung --  
14 the products that Samsung sold to Sprint which relate to  
15 marking.

16           The parties are going to work out a stipulation  
17 with respect to Fractus's position that we are not  
18 disputing that those are patented articles under Section  
19 287(a), and so we're working on the exact language, but  
20 Defendants agreed to withdraw those claim charts based on  
21 the agreement that we would be entering into that  
22 stipulation.

23           THE COURT: All right. Defendant concur with that  
24 representation?

25           MR. BREMER: Yes, Your Honor.

1 THE COURT: All right. Do you have other  
2 agreements, Ms. Ruiz?

3 MS. RUIZ: Yes, Your Honor. Defendants'  
4 objections to Plaintiff's exhibits on Bucket 4, this is for  
5 carrier -- related to carrier revenue. There was an  
6 agreement that the exhibits are subject to the Court's  
7 order on the motion in limine on this issue and that  
8 Fractus will redact the exhibits accordingly, and  
9 Defendants will review those redactions.

10 On Bucket 8, relating to expert testimony on use,  
11 there was an agreement that the exhibits must be in the  
12 expert report in order to come in, and that Fractus will  
13 redact, according to the Court's ruling on relevant MILs.

14 On Bucket 12, file type, there was an agreement  
15 that Fractus -- to the extent Fractus intends to use any  
16 files that Defendants cannot view, Fractus would provide  
17 software for Defendants to view those files.

18 And also to the extent any exhibit may be  
19 incomplete and Defendants identify those for Fractus,  
20 Fractus will provide complete exhibits in order for them to  
21 be pre-admitted or to remain on the exhibit list.

22 THE COURT: All right. Do Defendants concur with  
23 that representation?

24 MR. BREMER: Yes.

25 MS. RUIZ: On Bucket 13 which was relating to AT&T

1 documents, the parties agreed that the stipulation that --  
2 that we entered into yesterday would govern those  
3 documents, and specifically Ms. -- PX-91 was withdrawn,  
4 but -- but the general stipulation is that yesterday's  
5 stipulation governs that bucket.

6 I believe that's the extent of our agreements that  
7 we wanted to put on the record.

8 THE COURT: Do Defendants concur with that last  
9 agreement as Ms. Ruiz recited it regarding Bucket 13?

10 MR. BREMER: Yes, exhibits governed by the  
11 stipulation -- it will be governed by the stipulation and  
12 pre-admitted, but Exhibit 91 will be withdrawn.

13 THE COURT: All right. Are there other agreements  
14 that need to be recited into the record?

15 MS. RUIZ: I don't believe so, Your Honor.

16 MR. BREMER: No, Your Honor.

17 THE COURT: All right. Then I'll direct the  
18 parties to work with the courtroom deputy to see that a  
19 complete and finalized universe of pre-admitted exhibits  
20 are prepared and delivered and available before the trial  
21 begins.

22 Let me just make it clear. Whatever Ms. Lockhart  
23 tells you is what I want you to do, okay?

24 Are there other matters related to pre-trial that  
25 need to be raised with the Court?

1           Mr. Ward?

2           MR. WARD: One -- one item, Your Honor. We just  
3 really need a deadline or hopefully the Court will give us  
4 a deadline for identifying those witnesses that will be  
5 called live at trial.

6           There are currently 31 witnesses on the  
7 Defendants' may call list who are designated as live  
8 witnesses. There are others that are designated as  
9 deposition. And we can obviously deal with the deposition  
10 folks, but it's difficult to prepare our trial when there's  
11 31 folks on that may call who are live witnesses.

12           And we've got ours pared down to eight that are  
13 live witnesses on the may call. We told them who our will  
14 calls are. And we've been meeting and conferring and  
15 brought this up multiple times. So we're hoping the Court  
16 would say by X date, let's have an exchange of who really  
17 is a potential live witness.

18           THE COURT: What do Defendants say about this?  
19 What do you think is realistic for you to be more specific?

20           MR. FINDLAY: I think I would ask for -- let us  
21 confer for several days. Perhaps by Wednesday of next  
22 week, we get back with a much more pared down, ready-to-go  
23 list, Your Honor. That -- that's a week and a day before  
24 trial begins, which I think is adequate time.

25           THE COURT: This is Friday.

1 MR. FINDLAY: Yes, sir.

2 THE COURT: Tuesday at 5:00 p.m.

3 MR. FINDLAY: Understood.

4 THE COURT: All right?

5 MR. FINDLAY: Will do. Thank you, Judge.

6 MR. WARD: Thank you, Your Honor.

7 THE COURT: Any other matters that we need to take  
8 up?

9 Mr. Kubehl?

10 MR. KUBEHL: Good morning, Your Honor.

11 I appreciate the -- Your Honor is not taking up  
12 exhibit issues with respect to the T-Mobile and Verizon  
13 cases that may occur in the future. We have done a lot of  
14 work, both the Plaintiff and T-Mobile and Verizon to --

15 THE COURT: It's my sincere hope that what you've  
16 seen and observed with regard to the CommScope case will  
17 inform you as to those later cases, and we can save a lot  
18 of the time that's been expended in this instance.

19 MR. KUBEHL: Yes, Your Honor. My -- my point is  
20 that a lot of that work has been done, and there's been a  
21 lot of horse trading that's happened in -- between the  
22 CommScope, the T-Mobile, and the Verizon cases where  
23 accommodations have been made, and we've got a collection  
24 of exhibits where there are no objections in the T-Mobile  
25 case. And I expect in the Verizon case, as well.

1           And I would just like a memorialization that to  
2 the extent we have those agreements and exhibits that are  
3 not objected to, that those would be deemed pre-admitted so  
4 that we don't have a situation where we've made  
5 accommodations and horse trades in the CommScope case that  
6 have affected the T-Mobile case, and then later those are  
7 rethought and -- and new objections are raised. If -- if  
8 they're not objected to now, it seems like they ought to be  
9 considered pre-admitted.

10           And we've given them a list of those exhibits. We  
11 can work with them to make sure that that is the correct  
12 list, and we've proposed to submit that to the Court with  
13 the recognition that there are still some exhibits to work  
14 on.

15           THE COURT: What's the Plaintiff say?

16           MR. WARD: Your Honor, we're obviously willing to  
17 work with the other side. We were here until almost  
18 midnight last night on the CommScope case, so we haven't  
19 had a chance to -- we're struggling with this exhibit list.  
20 We're happy to work with them. We're not going to renege  
21 on agreements that we've made. And I don't foresee a  
22 problem. So we'll submit that list once we have it  
23 prepared and are ready to do it.

24           THE COURT: I would be very up -- very surprised  
25 and disappointed if there were backtracking going on. By

1 the same token, I understand Plaintiff's reluctance to say  
2 absolutely beyond all doubt right now these are locked in  
3 right now, given the focus has been solely in the Comm --  
4 on the CommScope case. I think just like some of these  
5 other matters, you ought to have your own deadline or I'll  
6 give you one by which you can put a finalization on that.  
7 It shouldn't wait. It should go ahead and get done. But  
8 I'm not trying to say Plaintiffs have to say now -- you  
9 know, yes or no now and forever right now as you stand  
10 here.

11 MR. WARD: Thank you, Your Honor.

12 THE COURT: If you all need some guidance from me  
13 on getting a deadline by which you get that done, let me  
14 know. Otherwise, I'll assume good lawyers will take care  
15 of it and not bring it back to me as a problem.

16 MR. KUBEHL: I hope we'll prove ourselves as good  
17 lawyers, Your Honor.

18 MR. WARD: We understand your direction. Thank  
19 you, Your Honor.

20 THE COURT: Okay. All right. Are there other  
21 matters related to anything concerning pre-trial in the  
22 CommScope case that haven't been taken up yet and need to  
23 be?

24 MR. WARD: Nothing from the Plaintiff.

25 MR. FINDLAY: Nothing from CommScope.

1 THE COURT: Then that will complete the pre-trial  
2 process.

3 Counsel, as I told you yesterday in chambers, I  
4 look forward to a civil, professional, and interesting  
5 trial. There's a lot of evidence. There are a lot of  
6 witnesses.

7 The Court expects counsel to work toward a common  
8 goal of making this trial clear and uninterrupted for the  
9 jury, and I have every confidence that that will be what we  
10 have.

11 I will see you -- if not before on other matters,  
12 I will see you for jury selection on the 3rd of October.

13 The Court stand in -- Mr. Ward?

14 MR. WARD: I'm sorry, Your Honor.

15 One question, and I meant to ask this earlier. Is  
16 there a time by which we can get the list of the panels for  
17 the venire and the jury questionnaires in advance?

18 THE COURT: Same process as always, Mr. Ward. You  
19 need to work with the deputy in charge. She typically --  
20 on a Monday morning jury selection, those typically are  
21 made available Thursday. This is a Thursday jury  
22 selection. Let Ms. Clendenning work with you on a similar  
23 early delivery of that information.

24 MR. WARD: Thank you, Your Honor.

25 THE COURT: Okay. We stand in recess.

1 COURT SECURITY OFFICER: All rise.

2 MR. FINDLAY: Thank you, Your Honor.

3 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes  
SHELLY HOLMES, CSR, TCRR  
OFFICIAL REPORTER  
State of Texas No.: 7804  
Expiration Date: 12/31/20

9/25/19  
Date